Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

YOUN MUN HEE,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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November 9, 2010

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QUESTION PRESENTED

I. Whether the Eleventh Circuit's decision conflicts with SEC v. Chenery Corp., 318 U.S. 80 (1943) where the Court affirmed the decision of the Board of Immigration Appeals based on a ground upon which the Board did not rely?

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OPINION BELOW

The opinion of Court of Appeals for the Eleventh Circuit Court of Appeals was entered on May 3, 2010, under the caption Youn Mun Hee v. U.S. Attorney General, No. 09-14612 (11th Cir. 2010)(unpublished). The decision is attached hereto as Appendix A. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Rehearing was denied on August 11, 2010. The Order is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 11, 2010. The Eleventh Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on August 24, 2009.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1229

(a)Notice to appear

(1) In general
In removal proceedings under section 1229a of this title, written notice (in this section referred to as a notice to appear) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the aliens counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.
(B) The legal authority under which the proceedings are conducted.
(C) The acts or conduct alleged to be in violation of law.
(D) The charges against the alien and the statutory provisions alleged to have been violated.
(E) The alien may be represented by counsel and the alien will be provided
(i) a period of time to secure counsel under subsection (b)(1) of this section and
(ii) a current list of counsel prepared under subsection (b)(2) of this section.
(F)
(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the aliens address or telephone number.

(iii) The consequences under section 1229a (b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)
(i) The time and place at which the proceedings will be held.
(ii) The consequences under section 1229a (b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general
In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the aliens counsel of record, if any) specifying

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a (b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception
In the case of an alien not in detention, a written notice shall not be required under this paragraph

if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files
The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general
In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction
Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1)

has elapsed and the alien has failed to secure counsel.

(c) Service by mail
Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of South Korea. Petitioner entered the United States without inspection by walking across the United States / Canada border in Washington. (A.R. 109)[1] On June 30, 2006, a Notice to Appear ("NTA") was issued alleging that Petitioner was subject to removal under INA § 212(a)(6)(A)(i) for being present in the United States without being admitted or paroled. (A.R. 111) The address listed in the NTA is 908 Glenridge Lane, Nashville, Tennessee 37221. (A.R. 111) The NTA did not contain a hearing date. (A.R. 111) It is unclear when the NTA was actually filed with the Court.

On July 16, 2008, Petitioner's wife, who is a United States citizen, filed an I-130 petition on his behalf. (A.R. 72, 77, 101) On the I-130 filed with United States Citizenship and Immigration Services ("USCIS"), Petitioner lists his residence as 6734 Mimosa Circle, Tucker, Georgia 30084. (A.R. 77)

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[1] A.R. refers to the Administrative Record that was filed with the Eleventh Circuit Court of Appeals. The underlying facts of the case are not disputed. The relevant facts are also set forth in the Eleventh Circuit's decision.

A hearing notice dated July 23, 2008 was allegedly mailed to Petitioner at the 908 Glenridge Lane, Nashville, Tennessee address. (A.R. 110) The notice states that the hearing date is September 17, 2008 at 8:30 a.m. at 180 Spring Street, SW, Suite 241, Atlanta Georgia 30303. (A.R. 110) This is a different address for the Court than the address contained on the NTA. (A.R. 110-11)

Petitioner did not appear at his September 17, 2008 Immigration Court hearing. At that hearing, the Immigration Judge issued an in absentia order of removal. (A.R. 107)

On December 9, 2008, Petitioner filed a motion to reopen with the Immigration Court. (A.R. 57-106) In the motion, Petitioner alleged that the hearing notice was not sent to the last address he provided to the Attorney General. (A.R. 58-60)

On December 18, 2008, the Immigration Judge denied the motion to reopen. The Court found that Petitioner failed to notify the Court of his change of address and as a result, the notice was sent to his last known address. (Appendix C)

Petitioner filed a timely appeal with the Board of Immigration Appeals. On August 24, 2009, the Board dismissed the appeal. (Appendix B) The Board found that Petitioner was required to submit a change of address by filing an EOIR-33 with the Immigration Court. Id. Thus, the Court found that the notice was proper because it was sent to the last address of record. Id.

Petitioner filed a Petition for Review with the Eleventh Circuit Court of Appeals. The Petition was denied solely on the ground that the contents of the I-130 petition filed by Hee's wife were not sufficient to constitute a written record of an address change within the meaning of 8 U.S.C. § 1229(a)(1)(F)(ii). (Appendix A, p. 7) The Court noted that although the I-130 gave Petitioner's Tucker, Georgia address, it did not state that this was a new address or that his address had changed. Id. In reaching its decision, the Court assumed arguendo that a Form I-130 could be used to make the required change of address notification. Id. Thus, the Court explicitly declined to address Petitioner's argument that the BIA erred in requiring his change-of-address notification be on EOIR-33. Id. at fn. 3.

Petitioner filed a timely Petition for Rehearing and Suggestion For Rehearing En Banc. In the Petition, Petitioner argued that the Eleventh Circuit's decision was improper because it was based on an entirely different ground that that used by the Agency in denying the Motion to Reopen. Petitioner further argued that the contents of the I-130 were sufficient notification of his change of address. On August 11, 2010, the Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in the instant case because the decision of the Eleventh Circuit directly conflicts with this Court's decision in SEC v. Chenery Corp., 318 U.S. 80 (1943).

The instant case involves the review of the Board's decision denying Petitioner's motion to reopen his in

absentia order of removal. The basis for the motion was that Petitioner did not receive adequate notice of his hearing at the last address he provided the Attorney General. After receiving the Notice to Appear, he moved to a new address. He did not inform the Court by filing an EOIR-33. However, he did indicate his address on a Form I-130 filed with the Department of Homeland Security. This was filed prior to the Court issuing a removal order. Petitioner argued that by listing his address on the Form I-130, he provided notification of his new address and that a change of address was not required to be made on an EOIR-33. He further argued that since the hearing notice was sent to his old address listed on the Notice to Appear, he did not receive proper notice of his hearing and that proceedings must be reopened.

The decision under review is the Board's decision dated August 24, 2009. (Appendix B) The sole basis for the Board's decision was that the notice of removal hearing was adequate because Petitioner did not notify the Court of his change of address by filing a Form EOIR-33. The Board rejected Petitioner's argument that a notification of a new address could be made on an I-130 as opposed to an EOIR-33.

The Eleventh Circuit denied the Petition for Review. In its decision, the Eleventh Circuit explicitly failed to address the Board's holding that notice was proper because Petitioner did not change his address by filing a Form EOIR-33. Instead, the Eleventh Circuit assumed that an I-130 could be used for a change-of-address notification but found that the contents of the particular I-130 were insufficient to constitute a change of address. This ground was not addressed by either the IJ or BIA based on the

Agency's finding that an EOIR-33 was the only way for an alien to change his address.

The Eleventh Circuit improperly relied upon a ground to deny the motion that was not set forth by the Agency. A fundamental principle of administrative law is that a court can uphold an agency's action or decision only for the reasons the agency expressly relies when it acted. This Court's 1943 decision in SEC v. Chenery Corp. states that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. Chenery Corp., 318 U.S. at 95. Thus, a federal appellate court cannot affirm the decision of an agency for reasons not addressed by the agency. As such, the Eleventh Circuit's decision is inconsistent with precedent from this Court.

Petitioner's writ of certiorari should be granted. The case must be remanded so that the Eleventh Circuit can review the Board's decision to determine whether the Board's decision set forth a proper justification for denial of the motion.

ARGUMENT

I. The Eleventh Circuit's decision conflicts with SEC v. Chenery Corp., 318 U.S. 80 (1943) where the Court affirmed the decision of the Board of Immigration Appeals based on a ground upon which the Board did not rely.

The instant case involves the review of the Board's August 24, 2009 decision denying Petitioner's motion to reopen. The sole basis for the Board's decision was that the notice of removal hearing was adequate because Petitioner did not notify the Court of his change of address by filing a Form EOIR-33. The Board rejected Petitioner's argument that a notification of a new address could be made on an I-130 as opposed to an EOIR-33. In its decision, the Eleventh Circuit explicitly failed to address the Board's holding that the hearing notice was sent to the proper address since Petitioner did not notify the Court of his new address by filing an EOIR-33. Instead, the Eleventh Circuit assumed that an I-130 could be used for a change-of-address notification but found that the contents of the particular I-130 were insufficient to constitute a change of address. This ground was not addressed by either the IJ or BIA based on the Agency's finding that an EOIR-33 was the only way for an alien to change his address. The Eleventh Circuit improperly relied upon a ground to deny the motion that was not set forth by the Agency.

A fundamental principle of administrative law is that a court can uphold an agency's action or decision only for the reasons the agency expressly relies when it acted. This Court's 1943 decision in SEC v. Chenery

Corp. states that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). "The Court is powerless to affirm the administrative action by substituting what [may] be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." SEC v. Chenery, 332 U.S. 194, 196 (1947)("Chenery II") Thus, a court reviewing an agency action cannot supply or substitute grounds for affirming agency action. See e.g. Banks v. Gonzales, 453 F.3d 449, 451 (7th Cir. 2006)(federal judges following Chenery cannot resolve administrative litigation on grounds the agency ignored); Mayo v. Schiltgen, 921 F.3d 177 (8th Cir. 1990)(a reviewing court may not uphold agency action based on reasons not articulated by the agency). The question after Chenery is not whether the ultimate action of the agency is permissible, but whether the agency offered a valid explanation for its action.

In Carpio v. Holder, the Tenth Circuit was presented with the question of whether someone who entered the United States on a K-2 visa was eligible to adjust status after the person turned 21 years old. Carpio v. Holder, 592 F.3d 1091 (10th Cir. 2010). The Court found that the reasons given by the Agency in finding Carpio ineligible for adjustment of status were improper and that he was eligible to adjust status. Id. The Court then goes on to address the government's alternate argument for affirmance of the BIA decision. Id. at 1103. The Tenth Circuit held that it did not have jurisdiction to consider the government's

argument under Chenery since the agency did not rely on the argument in its decision. Id.

In a recent Ninth Circuit decision, the Court remanded a case to the Agency to allow it to address in the first instance whether the alien's conviction for theft rendered him ineligible for cancellation of removal. Arredondo v. Holder, No. 08-73835, __ F.3d __, 2010 WL 4291391 (9th Cir. Nov. 2, 2010). The Board failed to engage in substantive analysis of its decision regarding the impact of the theft conviction on eligibility for cancellation of removal. Id. The Ninth Circuit held that because it could not affirm the Board's decision based on a ground upon which the BIA did not rely, the case must be remanded to clarify the grounds upon which the BIA relied.

Last year, the Eleventh Circuit Court of Appeals, in an unpublished decision, noted that the Eleventh Circuit had not previously applied Chenery where the BIA denied the case on a separate ground. Omoregbee v. U.S. Atty. Gen., 323 Fed.Appx. 829 (11th Cir. Apr. 21, 2009). In that case, the Board did not address the issue of whether Omoregbee had been convicted of an aggravated felony. Id. The Eleventh Circuit held that it would be improper under Chenery to address this basis for removal since the Board had relied on an alternate ground.

The panel's decision in the instant case conflicts with the Supreme Court's decision in Chenery. The affirmance was based on a ground not addressed by the Agency. In the instant case, the Board's decision was based solely upon Petitioner's failure to file a change of address with the Court on a Form EOIR-33. Based on this failure, the Board found that notice was

sufficient at the initial address Petitioner gave to DHS, which was the address contained on the Notice to Appear (Form I-862). In so holding, the Board rejected Petitioner's argument that Form EOIR-33 was only one way in which an alien could notify the government of a change of address.[2]

The Eleventh Circuit's decision affirming the Board's decision was based upon an entirely different ground. The Eleventh Circuit found that the contents of the particular I-130 filed by Hee's wife were insufficient to notify the Attorney General of Hee's change of address. In footnote 3, the panel explicitly stated that they declined to address whether an EOIR-33 is the sole means to notify the Attorney General of a change of address. Thus, the panel did not address the sole ground relied upon by the Board. Its decision was based on the sufficiency of the contents of this particular I-130 for the purpose of notifying the Attorney General of a change of address. It was

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[2] See Beltran v. INS, 332 F.3d 407 (6th Cir. 2003)(a letter to I.N.S. was sufficient notification of a change in address despite not filing an EOIR-33 with the Court); Kamara v. INS, 149 F.3d 904 (8th Cir. 1998)(EOIR-33 not needed for notification of a change of address); Popa v. Holder, 571 F.3d 890, 897 (9th Cir. 2009))an alien can properly change his or her address by submitting an EOIR-33 or other notice of the address). Thus, the decision of the Board in the instant case is inconsistent with the decisions of several appellate courts on the issue of whether an EOIR-33 is the only way to inform the Court of a change of address. In the instant case, the Eleventh Circuit assumed for purposes of the Petition that an I-130 could be used to fulfill this obligation.

improper to rely on this ground since it was never cited by the Agency in its decisions.[3]

The reasoning of the Agency should have been addressed by the Eleventh Circuit to determine if it was sufficient rather than relying on the sufficiency of the contents of the I-130 that had not even been addressed by the BIA or IJ. The Eleventh Circuit's decision violated the rule of this Court announced in Chenery that the court cannot affirm a decision based on a ground not addressed by the agency. Therefore, the writ of certiorari should be granted and the case remanded so that the Eleventh Circuit can review the decision of the Board to determine if it set forth an appropriate ground for denial.

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[3] It was improper to find the contents of the I-130 were insufficient to constitute a written record of a change of address. There is no requirement that notification of an address change under 8 U.S.C. § 1229(a)(1)(F)(ii) state that it is a new address. Furthermore, contrary to the Eleventh Circuit's decision (Appendix A, p. 7), the I-130 did show a change of address since the time the NTA was issued, which was in June 2006. The I-130 shows Petitioner started living at his new address in October 2007. At any rate, this issue was never addressed by the Agency.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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November 9, 2010

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-14612
Non-Argument Calendar

Agency No. A098-946-377

[Filed May 3, 2010]

YOUN MUN HEE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

(May 3, 2010)

Before BLACK, HULL and PRYOR, Circuit Judges.

PER CURIAM:

Youn Mun Hee, a citizen of South Korea, petitions for review of the Board of Immigration Appeals's ("BIA") dismissal of his appeal of the Immigration Judge's ("IJ") order denying his motion to reopen removal proceedings. After review, we deny the petition for review.

I. BACKGROUND FACTS

In June 2006, Hee was discovered in the United States after he was arrested by police in DeKalb County, Georgia. On June 27, 2006, an immigration official interviewed Hee and prepared a Form I-213 "Record of Deportable/Inadmissible Alien." Hee admitted that he had entered the United States illegally by walking across the U.S. border with Canada, stated that he was amenable to removal and requested a hearing before an Immigration Judge. During the interview, Hee reported his address as 908 Glenridge Lane in Nashville, Tennessee.

On the same day, Hee was served with a Notice to Appear ("NTA") indicating that his hearing would be in Atlanta, Georgia at a date and time to be set. The NTA also listed Hee's address as 908 Glenridge Lane in Nashville and indicated that his notice of the hearing would be sent to the address Hee had provided. The NTA warned Hee, inter alia, that: (1) he was "required to provide the [Immigration and Naturalization Service ("INS")], in writing, with [his]

full mailing address and telephone number"; (2) if his address or telephone number changed during the course of immigration proceedings, Hee must "notify the Immigration Court immediately by using Form EOIR-33"; (3) if Hee failed to submit Form EOIR-33 and did not "otherwise provide an address" at which he could be reached, the government was not required to provide him with written notice of his hearing; and (4) if Hee failed to appear at his hearing, the Immigration Judge might enter a removal order in his absence.

On July 15, 2008, Hee's wife, a naturalized United States citizen, submitted a Form I-130 "Petition for Alien Relative," to the Department of Homeland Security ("DHS") so that Hee could apply for an adjustment of status to that of a lawful permanent resident. Hee's wife was represented by counsel in connection with the Form I-130 petition. On the form, Hee's wife indicated that Hee's address was 6734 Mimosa Circle in Tucker, Georgia and that he had lived at that address since October 2007. Hee's wife also indicated on the form that Hee was in removal proceedings in Atlanta in May 2008. Nowhere on the form did Hee's wife indicate that Hee's Tucker, Georgia address was a change of address.

On July 23, 2008, the Immigration Court mailed a Notice of Hearing ("NOH") to Hee's Nashville, Tennessee address, stating that Hee's hearing would be held on September 17, 2008. The NOH was returned as "not deliverable." The return envelope indicated that it could not be forwarded. When Hee failed to appear at his hearing, the IJ ordered Hee removed in absentia.

In December 2008, Hee moved the IJ to reopen his removal proceedings and rescind the in absentia removal order. Hee argued that he did not receive proper notice of the hearing because the NOH was not sent to his Tucker, Georgia address listed on the Form I-130. The IJ denied the motion, finding that the NOH was sent to the address Hee provided to immigration officials when he was apprehended, as indicated on the NTA. The IJ concluded that Hee had failed to notify the Immigration Court of his address change and, thus, was not entitled to have his removal order rescinded.

Hee appealed to the BIA, arguing that he notified the Attorney General of his address change via the Form I-130 and that notice of a new address need not be on a Form EOIR-33 to be valid. The BIA dismissed Hee's appeal. The BIA concluded that Hee had "failed to notify the Court of his change of address by filing a Form EOIR-33" and agreed with the IJ that notice of the hearing "was adequate because the NOH was sent to the last address of record." Hee filed this petition for review.

II. DISCUSSION

An alien who seeks to reopen removal proceedings following the entry of an in absentia removal order must demonstrate either exceptional circumstances or that the alien did not receive proper notice under 8 U.S.C. § 1229(a)(1) or (2). INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).[1] Hee does not contend that he has

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[1] We review the denial of a motion to reopen for abuse of discretion. See Anin v. Reno, 188 F.3d 1273, 1276 (11th Cir. 1999).

shown exceptional circumstances, but argues that his notice of the hearing was not proper under § 1229(a)(2).[2]

Under § 1229(a)(1), an alien in removal proceedings must be provided with written notice of the time or place of the alien's hearing. INA § 239(a)(1)(G)(I), 8 U.S.C. § 1229(a)(1)(G)(I). Pursuant to § 1229(c), this notice is effective if sent by mail "to the last address provided by the alien in accordance with subsection (a)(1)(F)." Id. § 239(c), 8 U.S.C. § 1229(c).

If such written notice is provided, but the alien nonetheless fails to attend the hearing, that alien shall be removed in absentia if the government proves that notice was sent and that the alien is removable. INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A). Due process is satisfied "so long as the method of notice is conducted in a manner reasonably calculated to ensure

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"In this particular area, the BIA's discretion is quite broad." Id. (internal quotation marks omitted). Our review is limited to whether the exercise of discretion was "arbitrary or capricious." Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149 (11th Cir. 2005). The BIA's legal determinations are reviewed de novo. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1195 (11th Cir. 2006). Where, as here, the BIA did not expressly adopt the IJ's decision or reasoning, we review only the BIA's decision. See Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001).

[2] In the context of a motion to reopen an in absentia removal order, our jurisdiction to review is limited to: (1) the validity of the notice provided to the alien; (2) the reasons why the alien did not attend the proceeding; and (3) whether the alien is removable. INA § 240(b)(5)(D), 8 U.S.C. § 1229a(b)(5)(D). Thus, we have jurisdiction to review Hee's claim that he failed to appear because he did not receive valid notice of the hearing.

that notice reaches the alien." U.S. Att'y Gen. v. Dominguez, 284 F.3d 1258, 1259 (11th Cir. 2002) (quotations marks omitted) (concluding that a handwritten note that an alien was "staying with" her cousin at a particular address did not satisfy the requirement to provide the Attorney General with written notice of a change of address). Thus, when the alien has failed to appear, "written notice by the Attorney General shall be considered sufficient . . . if provided at the most recent address provided under section 1229(a)(1)(F)." INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A); see Dominguez, 284 F.3d at 1260-61.

Section 1229(a)(1)(F)(ii) imposes upon the alien an affirmative duty to "provide the Attorney General immediately with a written record" of his change of address. INA § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii); Dominguez, 284 F.3d at 1260-61. The regulation implementing this statutory provision requires the alien to provide "written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed." 8 C.F.R. § 1003.15(d)(2).

On appeal, Hee argues he satisfied his duty to inform the Attorney General of his change of address when his wife submitted the Form I-130 "Petition for Alien Relative," to DHS and, therefore, his NOH should have been sent to his Tucker, Georgia address. We disagree.

Although the Form I-130 Hee's wife submitted to DHS gave Hee's Tucker, Georgia address, the form did not give any indication at all that the Tucker, Georgia address was a new address or that Hee's address had changed since his removal proceedings began and he

provided the Nashville, Tennessee address. Indeed, because the Form I-130 indicates that Hee has lived at the Tucker, Georgia address since October 2007 and incorrectly states that Hee's removal proceedings began in May 2008 (when in fact they began in June 2006), from the face of the form it appears Hee's address has not changed since removal proceedings began. For these reasons, even assuming arguendo a Form I-130 could be used to make the required change-of-address notification, the contents of the particular Form I-130 Hee's wife submitted were insufficient to constitute a written record of an address change within the meaning of § 1229(a)(1)(F)(ii).[3]

Given that the Immigration Court mailed the NOH to Hee's address in Nashville, Tennessee, the last address Hee provided, the government's notice was sufficient under 8 U.S.C. § 1229a(b)(5)(A) and § 1229(c). Accordingly, there is no basis to conclude that the BIA abused its discretion in denying Hee's motion to reopen.

PETITION DENIED.

---

[3] Because we conclude that the contents of the particular Form I-130 Hee's wife submitted were insufficient to notify the Attorney General of Hee's address change, we need not address Hee's argument that the BIA erred in requiring his change-of-address notification to be on Form EOIR-33 and that 8 C.F.R. § 1003.15(d)'s requirement that aliens use Form EOIR-33 goes beyond § 1229(a)(1)(F)(ii) and is an unreasonable interpretation of that statute. We likewise do not address the government's argument that submitting the Form I-130 was insufficient to notify the Attorney General because it was sent to DHS, which is not a component of the Department of Justice or a delegate of the Attorney General.

APPENDIX B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Wong, Margaret W., Esq.
Margaret Wong & Associates
3150 Chester Avenue
Cleveland, OH 44114-0000

Office of the Chief Counsel - USICE/DHS - ATL
180 Spring Street, Suite 332
Atlanta, GA 30303

Name: HEE, YOUN MUN A098-946-377

Date of this notice: 8/24/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
King, Jean C.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A098 946 377 - Atlanta, GA

Date: AUG 24 2009

In re: YOUN MUN HEE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Margaret Wong, Esquire

ON BEHALF OF DHS:
Kelley N. Sydnor
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of South Korea, has appealed the Immigration Judge's December 18, 2008, denial of his motion to reopen proceedings in which he was ordered removed *in absentia*. The appeal will be dismissed.

The respondent was ordered removed in absentia on September 17, 2008. He filed a motion to reopen arguing that he did not receive the July 23, 2008,

Notice of Hearing (NOH). The Immigration Judge found, however, that the notice was mailed to the respondent's last known address. On appeal, the respondent argues that he provided a correct address to the Department of Homeland Security ("DHS") which is sufficient notice of change of address, and the court did not mail the NOH to the correct address. According to the respondent, he had, before the NOH was issued, filed through counsel an I-130 application with the DHS containing a different, correct address. However, the record reflects that the respondent was personally served with the Notice to Appear and provided oral and written notice of the address requirements and of the consequences of failing to appear for his hearing. The respondent failed to notify the Court of his change of address by filing a Form EOIR-33. Consequently, we agree with the Immigration Judge that notice was adequate because the NOH was sent to the last address of record. *See Dominguez v. United States Attorney General*, 284 F.3d 1258 (11th Cir. 2002)

ORDER: The appeal is dismissed.

/s/ Jean King
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

MARGARET WONG & ASSOCIATES
WONG, ESQ., MARGARET W.
3150 CHESTER AVE
CLEVELAND, OH 44114

IN THE MATTER OF
HEE, YOUN MUN

FILE A 098-946-377 DATE: Dec: 19, 2008

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c) (3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c) (3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c) (6), 8 U.S.C. SECTION 1229a(c) (6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOU MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

__ OTHER: See attached

/s/
COURT CLERK
IMMIGRATION COURT FF

CC: DHS

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
Youn Mee Hee
RESPONDENT/APPLICANT

Case No.: A 098 946 377
Docket: Atlanta
IN Removal PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

- ☐ Motion to Reconsider an Immigration Judge's decision
- ☒ Motion to Reopen proceedings

filed in the above entitled matter, it is **HEREBY ORDERED** that the motion

- ☐ be granted.
- ☒ be denied for the reasons indicated in the attached decision.

/s/ Grace A. Sease
Immigration Judge

Date: Dec. 18, 2008

Appeal: RESERVED/WAIVED (A / I / B)

Form EOIR - 2
REV. - JUNE 93

Youn Mee HEE
A 098 946 377

The respondent though counsel has filed a motion to reopen an *in absentia* proceeding. The government does not support the motion. The motion will be denied.

The respondent was placed in proceedings on or about June 30, 2006 with the issuance and personal service of a Notice to Appear. *Exhibit 1.* The respondent was advised of his rights in the Korean language, *Exhibit 2.* At the time the respondent was apprehended and processed by ICE, he advised the special agent conducting the interview that he entered the United States by walking across the Canadian border near Seattle, Washington and that he was not inspected or admitted. Accordingly he was charged with being subject to removal pursuant to the provisions of Section 212(a)(2)(6)(I).

The Notice to Appear was filed with the Immigration Court and notice of hearing was sent to the respondent at the address he provided when apprehended. At the time he was served with the Notice to Appear, the respondent was advised of the requirement that he notify the court of any change of address.

An order entered *in absentia* in removal proceedings may be rescinded only (I) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that his failure to appear was because of exceptional circumstances or (ii) upon a motion to reopen filed at any time if he demonstrates that he did not receive due notice or that he was in federal or state custody and his failure to appear was

through no fault of his own. 8 C.F.R.§ 1003.23(b)(4)(ii). The failure to appear because of "exceptional circumstances" refers to circumstances such as serious illness or death of an immediate relative, but not including less compelling circumstances. INA § 240(e)(1).

In *Dominguez v. U.S. Attorney General*, 284 F.3d 1258, 1259 (11th Cir. 2002), the Eleventh Circuit Court of Appeals held that due process is satisfied "so long as the method of notice is conducted in a "in a manner 'reasonably calculated' to ensure that notice reaches the alien." Citations omitted.

Moreover, in light of the respondent's admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is ineligible to adjust his status in the United States.

The respondent failed to notify the Court of his change of address. Accordingly, the notice of hearing was sent to his last known address, a manner reasonably calculated to ensure that notice reached him.

Accordingly, the motion to reopen is denied.

Done and ordered this 18th day of December 2008

/s/ Grace A. Sease
Grace A. Sease
U.S. Immigration Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-14612-GG

[Filed August 11, 2010]

YOUN MUN HEE,	)
	)
Petitioner,	)
	)
versus	)
	)
U.S. ATTORNEY GENERAL,	)
	)
Respondent.	)
	)

Petition for Review of a Decision of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, HULL and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hall
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

Supreme Court, U.S.
FILED
MAR 16 2011
OFFICE OF THE CLERK

No. 10-629

In the Supreme Court of the United States

YOUN MUN HEE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
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Department of Justice
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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Board of Immigration Appeals' denial of petitioner's motion to reopen the *in absentia* order of removal entered against him.

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In the Supreme Court of the United States

No. 10-629

YOUN MUN HEE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 10a-11a) and the immigration judge (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2010. A petition for rehearing was denied on August 11, 2010 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an immigration judge

"shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. 1229a(a)(1). Removal proceedings under 8 U.S C. 1229a commence with the filing of a Notice to Appear (NTA) with the immigration court. 8 C.F.R. 1239.1(a). Additionally, the NTA must be provided to the alien in person or through service by mail on the alien or his representative, if personal service is impracticable. 8 U.S.C. 1229(a)(1). The NTA requires, *inter alia*, that the alien immediately provide to the Attorney General an address where he may be contacted regarding the removal proceedings and that the alien immediately inform the Attorney General of any change in the alien's address. 8 U.S.C. 1229(a)(1)(F). The implementing regulation requires the alien to provide "written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed." 8 C.F.R. 1003.15(d)(2). The NTA also apprises the alien of the consequences of failing to appear for a scheduled hearing—specifically, the possibility that the immigration judge may order the alien removed *in absentia*. 8 U.S.C. 1229(a)(1)(G)(ii).

Notice of a hearing in an alien's case must be provided to him at the last address provided to the Attorney General. 8 U.S.C. 1229(a)(2), 1229a(b)(5)(A). If the alien fails to appear for a scheduled hearing, and the Department of Homeland Security (DHS) establishes by "clear, unequivocal, and convincing evidence" that written notice of the hearing was provided consistent with the terms of the statute, the alien "shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An *in absentia* order of removal may be rescinded in only two circumstances: (1) if the alien demonstrates that his failure to appear was on account of exceptional circum-

stances, by a motion to reopen filed within 180 days of entry of the *in absentia* order; or (2) if the alien demonstrates that he failed to receive notice consistent with 8 U.S.C. 1229(a), by a motion to reopen filed at any time. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii).

2. a. Petitioner is a native and citizen of South Korea. Pet. App. 10a. On or about June 30, 2006, DHS personally served petitioner with an NTA charging him with being subject to removal pursuant to 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 15a. The NTA listed a Nashville, Tennessee address that petitioner had provided during an earlier immigration interview as the location to which notices in his proceedings would be mailed. *Id.* at 2a. The NTA also warned petitioner that (1) he was "required to provide the [Immigration and Naturalization Service (INS)], in writing, with [his] full mailing address and telephone number"; (2) he must "notify the Immigration Court immediately by using Form EOIR-33" of any changes in address or phone number; (3) if he failed to submit Form EOIR-33 and did not "otherwise provide an address," the government was not required to provide him with written notice of his hearing; and (4) if petitioner failed to appear at his hearing, the immigration judge might enter a removal order in his absence. *Id.* at 2a-3a (brackets in opinion).

On July 15, 2008, petitioner's wife submitted to DHS a Form I-130 "Petition for Alien Relative" so that petitioner could apply for an adjustment of status. Pet. App. 3a. That form listed petitioner's address as one in Tucker, Georgia, and represented that petitioner had been living at that Georgia address since October 2007. *Ibid.* The form also (incorrectly) stated that petitioner

had been in removal proceedings since May 2008. *Ibid.* No notice of the Georgia address was provided to the immigration court or to any other component of the Department of Justice. See *id.* at 7a n.3; Gov't C.A. Br. 14-18.

On July 23, 2008, the immigration court mailed to petitioner a notice of hearing in his removal proceedings at the Nashville, Tennessee address he had previously provided. Pet. App. 3a, 15a. The hearing notice was returned to the immigration court as undeliverable, with an indication that it could not be forwarded. *Id.* at 3a. Petitioner failed to appear at the scheduled hearing, and the immigration judge ordered him removed *in absentia* at the conclusion of that September 17, 2008 hearing. *Ibid.*

b. In December 2008, petitioner filed a motion to reopen his removal proceedings and to rescind the *in absentia* order of removal. Pet. App. 4a. Petitioner argued that he did not receive the notice of hearing, as he had moved from the Nashville, Tennessee address. *Ibid.* Petitioner contended that the notice was invalid and should have been sent to his current address in Georgia, because that address had been listed in the I-130 visa petition his wife submitted to DHS. *Ibid.*

The immigration judge denied petitioner's motion. Pet. App. 12a-16a. The immigration judge found that petitioner "failed to notify the [immigration] [c]ourt of his change-of-address" and that the hearing notice was thus properly mailed to his last known address. *Id.* at 16a. The immigration judge added that, "in light of [petitioner's] admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is

ineligible to adjust his status in the United States." *Ibid.*

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal of the immigration judge's decision. Pet. App. 8a-11a. The Board noted that petitioner had been personally served with the NTA and that it had informed him of both the change-of-address notification requirements as well as the consequences of failing to appear for a scheduled hearing. *Id.* at 11a. The Board determined that petitioner had failed to notify the immigration court of his change in address by filing a Form EOIR-33, and, in doing so, rejected his contention that his wife's submission of an I-130 visa petition to DHS was sufficient to put the immigration court on notice of his address change. *Ibid.* Because the hearing notice was mailed to the last address provided by petitioner to the immigration court, the Board agreed with the immigration judge that notice was adequate. *Ibid.*

3. The court of appeals denied petitioner's petition for review in an unpublished, per curiam opinion. Pet. App. 1a-7a. The court concluded that the hearing notice had been properly mailed to the Nashville, Tennessee address, because that address was the last one petitioner had provided. *Id.* at 7a. Holding that such notice was sufficient under the relevant statutes, the court found no abuse of discretion in the Board's denial of petitioner's motion to reopen. *Ibid.*

In reaching that conclusion, the court did not address the specific arguments raised by petitioner and the government in their respective briefs. See Pet. App. 7a n.3. The court did not reach petitioner's contention that the Board erred in presumptively requiring a notice of a change of address to be on a specific form (Form EOIR-

33), or the government's argument that the filing of the I-130 visa petition was insufficient notice to the Attorney General because DHS is not a component of the Department of Justice or a delegate of the Attorney General under the INA. *Ibid.* Rather, the court decided only that the I-130 visa petition submitted by petitioner's wife was insufficient. *Id.* at 6a-7a. The court observed that the petition did not explicitly state that the Georgia address was a new address or that it was a change of address since the time petitioner was placed into removal proceedings. *Ibid.* To the contrary, the court explained, the petition (incorrectly) indicated that petitioner's removal proceedings had begun in May 2008 but that he had been living at the Georgia address since October 2007. *Id.* at 7a. The court thus held that, "even assuming *arguendo* a Form I-130 could be used to make the required change-of-address notification," the contents of the Form I-130 submitted in this case were inadequate under 8 U.S.C. 1229(a)(1)(F)(ii) to effect an official change of address. Pet. App. 7a.

ARGUMENT

Petitioner contends that the decision below conflicts with this Court's holding in *SEC* v. *Chenery*, 318 U.S. 80 (1943), that a court of appeals may not dispose of a petition for review of an administrative agency decision on a ground not relied upon by the agency. The decision below, however, is correct and does not clearly implicate *Chenery*, as the Board and the court of appeals reached the same conclusion for the same ultimate reason—*i.e.*, that petitioner had not validly changed his address of record. Although the court of appeals relied in part on a narrower basis than that considered by the Board, *Chenery* does not forbid that result. In any event, there

were (and are) no compelling reasons for a remand: petitioner does not and cannot make any colorable claim that a different result would have been reached on remand, nor any colorable claim that he could pursue relief from removal even if proceedings were reopened. Further review is therefore unwarranted.

1. The decision below does not implicate this Court's decision in *Chenery*. Under *Chenery*, courts of appeals generally are not empowered to decide a petition for review of administrative action on a ground not relied upon by the agency. See 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Rather, if a reviewing court finds error in the agency's rationale for its decision, or the ultimate decision itself, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

In this case, the court of appeals upheld the Board's denial of petitioner's motion to reopen and to rescind the *in absentia* removal order. In doing so, the court based its determination on the same determination the Board made: that the hearing notice at issue was adequate because it was mailed to the last address provided by petitioner to the immigration court. See Pet. App. 7a, 11a. At that level, the decision of the court of appeals is fully consistent with the Board's decision and presents no *Chenery*-related problem.

It is true that the Board based its determination in part on the fact that petitioner did not inform the immigration court directly of his change of address by filing a Form EOIR-33. Pet. App. 11a. But the court of appeals did not find any error in the Board's determination

that the regulatory scheme required petitioner to inform the immigration court of any address change, or that notice to DHS (as opposed to the Department of Justice) was insufficient under the statute to effect notice of a change of address. *Id.* at 7a & n.3. Rather, the court of appeals stated that, "even assuming *arguendo* a Form I-130 could be used to make the required change-of-address notification," the petition for review must still be denied on the narrower ground that the Form I-130 submitted by petitioner's wife did not do so within the meaning of 8 U.S.C. 1229(a)(1)(F)(ii). Pet. App. 7a. *Chenery* does not require parsing an agency's rationale so finely as to prohibit the court of appeals' rejection of petitioner's position in the manner done below.

2. A practical application of *Chenery* further demonstrates no basis for a remand to the agency. As an initial matter, as noted above, the court of appeals did not find any error in the Board's analysis of petitioner's claim. See Pet. App. 6a-7a. Moreover, petitioner makes no colorable claim that the Board would have reached a different result if a remand had been ordered. Indeed, both the Board and the court of appeals were plainly correct.

As to the former, the relevant statute requires notice to the Attorney General regarding any change in the alien's address, and the relevant regulation makes the immigration court the Attorney General's delegate (and, by its terms, requires submission of Form EOIR-33). See 8 U.S.C. 1229(a)(1)(F)(ii); 8 C.F.R. 1003.15(d)(2); p. 2, *supra*. Notice *to DHS*, a different Cabinet Department over which the Attorney General exercises no authority, by means of a different form filed by petitioner's wife and serving a different purpose is clearly outside the statutory and regulatory scheme.

Even assuming *arguendo* that the statute authorized submission of an I-130 visa petition to DHS to effect notice of a change of address, as the court of appeals did, the I-130 petition submitted by petitioner's wife was insufficient for the reasons stated in the court's decision. There was no indication on the face of that document that the address contained therein reflected a change in petitioner's address. Pet. App. 6a-7a. The document indicated that petitioner had been living at the Georgia address since October 2007 and that removal proceedings had been initiated in May 2008 (even though they had actually begun in June 2006). *Ibid.* That timeline gave DHS (let alone the Department of Justice) no reason to believe that the Georgia address was a new address because, according to the I-130 petition, petitioner had been living at the Georgia address *before* the institution of removal proceedings. In light of that erroneous submission even to DHS, for which the government bears no fault, there is no reasonable likelihood that the Board would have reached a different decision on remand regarding the ultimate outcome of petitioner's motion to reopen. "To remand [in this case] would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

3. In any event, further review is not warranted in this case to consider petitioner's claim of a factbound misapplication of *Chenery*. The unpublished, per curiam opinion below does not implicate a principle of law on which the courts of appeals are in disagreement, and petitioner does not contend otherwise. And for the reasons explained above (pp. 8-9, *supra*), there is no basis for concluding that granting the petition and remanding

to the court of appeals would have any effect on the ultimate disposition of petitioner's motion to reopen.

Finally, even assuming that removal proceedings were reopened, it does not appear that petitioner would be eligible to adjust his status from within the United States anyway, as he entered without being admitted or inspected and has not alleged eligibility for adjustment of status under 8 U.S.C. 1255(i) (providing that certain aliens unlawfully present in the United States may adjust their status). See Pet. App. 16a ("[I]n light of [petitioner's] admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is ineligible to adjust his status in the United States."); see also 8 U.S.C. 1255(a) (providing that the Attorney General may adjust status of "an alien who was inspected and admitted or paroled into the United States * * * to that of an alien lawfully admitted for permanent residence"); 8 C.F.R. 1245.1(b)(3) (alien not inspected or admitted is generally ineligible to apply for adjustment of status under 8 U.S.C. 1255). The lack of any likely effect on petitioner's status as a removable alien is a further reason to decline review.*

---

* Petitioner has not asserted eligibility for any other form of relief from removal, nor is it apparent that he would be eligible for such any relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

MARCH 2011